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No. 85-1469

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

MASSACHUSETTS DEPARTMENT OF EDUCATION
AND DARTMOUTH SCHOOL COMMITTEE,

Petitioners,

v.

DAVID D.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress in enacting the Education for All Handicapped Children Act (20 U.S.C. § 1400 *et seq.*) intended to allow states to continue to supplement the "basic floor" of educational opportunity created by the federal act.

2. Whether in creating a "comprehensive scheme" for enforcement of special education rights Congress effectively vested the federal courts with the authority to enforce both the federal and the supplemental state protections.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent David D. respectfully requests that the petition for a writ of certiorari to review the decision of the

United States Court of Appeals for the First Circuit be denied.

STATEMENT OF THE CASE

In this case the United States Court of Appeals for the First Circuit addressed the question of whether Congress in enacting the Education for All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1400 et seq., intended to allow states to continue to supplement the "basic floor" of educational opportunity created by the federal act, and whether in creating a "comprehensive scheme" for enforcement of special education rights Congress effectively vested the federal courts with the authority to enforce both the federal and the supplemental state protections.

The First Circuit as well as the Courts of Appeal for the Third and Ninth

Circuits have all agreed that both questions should be answered in the affirmative. David D. v. Dartmouth School Committee, 775 F. 2d 411 (1st Cir. 1985); Geis v. Board of Education of Parsippany-Troy Hills, 774 F. 2d 575 (3rd Cir. 1985); Students of California School for the Blind, 736 F. 2d 538 (9th Cir. 1984), vacated as moot 105 S. Ct. 1820 (1985). Although not explicitly addressed by either the Court of Appeals or the District Court, plaintiff has argued throughout this case, and will argue infra that the Individual Education Plan ("IEP") offered by the local school officials was so inadequate that it failed to meet the federal "basic floor" requirements, even without the supplemental state protections.

David D. is a nineteen-year-old, mentally retarded young man who functions at the kindergarten to first-grade level. The issue at the administrative hearing, when David was fifteen years old, was whether the program at the public high school offered by the Dartmouth School Committee met David's considerable educational and behavioral/emotional needs. App. 152. The administrative hearing officer found that David exhibited socially unacceptable sexual and aggressive behavior, and that this behavior "could pose a real deterrant" to his acceptance in a vocational work program. App. 133, 143. The hearing officer found that David's IEP should be directed toward maximizing his potential for community living, but

nonetheless finds the IEP to be adequate. App., 145.

At trial in District Court plaintiff presented additional expert witness as well as neighbors, who testified regarding the scope and severity of David's behavioral problems and well as overwhelming need for a consistent highly structured program to address those problems. David D. v. Dartmouth School Committee, 615 F. Supp. 639, 641-44 (D. Mass. 1984). App. 69-80. The District Court accepted the hearing officer's conclusions on several subsidiary points, but based on the agreement of the parties on David's need for training in behavioral and social skills, and on the substantial evidence that this training could not be appropriately delivered at the public high school program proposed

by Dartmouth, found that David could not make "effective educational progress" in that program. Id., 615 F. Supp. at 646-48, App. 92-101. Following the First Circuit's decision in Town of Burlington v. Department of Education 736 F. 2d 773 (1st Cir. 1984) affirmed on other grounds, 105 S. Ct. 1996 (1985), the District Court found that the higher standard for educational opportunity established by Massachusetts law is incorporated into the EAHCA and held that the proposed IEP did not meet that standard. Id., 615 F. Supp. at 647-8, App. 101-103.

On appeal, despite its earlier decision in the Burlington case, the First Circuit reconsidered its analysis of the role of state standards in the EAHCA. After careful analysis of this

Court's recent decisions in Pennhurst State School and Hospital v. Halderman, 104 S. Ct. 900 (1984) and Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142 (1985) as well this Court's major decisions interpreting the EAHCA, the Court of Appeals reaffirmed its view that state standards were expressly incorporated into the comprehensive statutory scheme established by the EAHCA and that those standards were enforceable in federal as well as state court. David D. v. Dartmouth School Committee, 775 F. 2d 411, 416-423 (1st Cir. 1985), App. 20-5J.

Ninety days after a petition for rehearing and suggestion for rehearing en banc was denied, the Massachusetts Attorney General filed a Petition for Certiorari, apparently on behalf of both

the Massachusetts Department of Education and the Dartmouth School Committee.

SUMMARY OF ARGUMENT

Certiorari is not warranted in this case because the decision below is not in conflict with decisions of this Court, other federal courts of appeal, or the Massachusetts Supreme Judicial Court. In fact the First Circuit's decision follows decisions of this Court and the Massachusetts Supreme Judicial Court, and is entirely consistent with the decisions of the only two other federal courts of appeal which have addressed the issue of the role of state law in the EAHCA.

Even if there were some inconsistency among the circuits, this case would not warrant a grant of certiorari because of its limited impact. The decision, even

if adopted by all circuits, would only affect the handful of states which have state statutes which establish a higher standard of educational opportunity than the EAHCA. Even within those states, the decision would affect the few situations where the case is in federal, not state, court and the resolution of the dispute turns upon whether the state or federal legal standard is applied. The case at bar is an example of one which does not turn on the choice of law, since the Individual Education Plan proposed by the Dartmouth School Committee did not meet either the federal minimum or the state higher standard.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF COURT BELOW AND THE DECISIONS OF THIS COURT, THE OTHER FEDERAL COURTS OF APPEAL, OR THE MASSACHUSETTS SUPREME JUDICIAL COURT.

To warrant full consideration by this Court on a petition for certiorari, petitioner must show, at a minimum, that there is a direct conflict between the Court of Appeals decision and decisions of this Court, the courts of appeal of the other federal circuits or the highest appellate court of the affected state. See U.S. Sup. Ct. Rule 17.1(a), Stern and Grossman, Supreme Court Practice, 5th ed., 1978. 264-66 (hereinafter, "Stern and Grossman").

Petitioners can show no such conflict because the First Circuit's decision below follows earlier decisions of this Court and the Supreme Judicial

Court of Massachusetts, and is entirely consistent with decisions of the other two federal courts of appeal which have considered this issue.

A. THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT, MUCH LESS THE TYPE OF DIRECT CONFLICT WHICH WOULD WARRANT REVIEW.

1. There is no conflict between the decision below and the decisions of this court interpreting the Education of All Handicapped Children Act.

Petitioners have suggested in their petition for certiorari (see, e.g., Petition at 24-5), that the First Circuit's decision is in conflict with this Court's holding in Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982). As the following analysis illustrates, the decision in Dartmouth School Committee v. David D., supra, is not only not in conflict with this Court's analysis of the EAHCA in

Rowley, supra and other decisions, but in fact is perfectly consistent with and builds upon the principles established by this Court in its analysis of the EAHCA.

a. This Court has interpreted the EAHCA to retain an important role for the states in protecting special education rights of disabled children.

Much of the First Circuit's analysis of the EAHCA in its decision below was based on its earlier extensive analysis of the Act in Town of Burlington v. Department of Education, 736 F. 2d 773 (1st Cir. 1984) ("Burlington II") which was affirmed by this Court on the issue of scope of a Court's equitable authority under the Act in Burlington School Committee v. Department of Education, __ U.S. ___, 105 S. Ct. 1996 (1985). In both cases the First Circuit makes extensive use of this Court's language

in Rowley. The analysis is further supported by later decisions of this Court in Burlington, supra and Smith v. Robinson, ___ U.S. ___, 104 S. Ct. 3457 (1984). Thus the statutory definition of "free and appropriate public education," § 1401(18), was seen as a checklist for adequacy under the Act, Rowley 458 U.S. at 189, and it was that standard which would constitute the federal "floor of opportunity" imposed by Congress upon the states as a federal minimum standard.

This Court recognized that the statutory scheme is one which envisions significant and complementary roles for the states in relationship to the federal government. The states were viewed as continuing to have "the primary responsibility for formulating the education to be accorded a handicapped child," Rowley,

458 U.S. at 207. Thus, while Congress did not intend for the Act to "displace the primacy of States in the field of education," Rowley, 458 U.S. at 208, The statute did "impose significant requirements to be followed in the discharge of that responsibility, Rowley, 458 U.S. at 183.

Although appreciating the significant and complementary roles assigned to both state and federal government, this Court quite clearly limited its analysis to the issue of what was the proper federal standard. The related question of what requirements may be imposed upon the state as a result of its own statutory requirements was not before the Court and was certainly not addressed. As the Court of Appeals for the First Circuit correctly pointed out, "there is no indi-

cation in either the statutory language or the legislative history of the Act that Congress intended to create a substantive or procedural ceiling regarding the rights of the disabled child." David D. v. Dartmouth, 775 F.2d at 416, citing Burlington II. See also Geis v. Board of Education of Parsippany-Troy Hills, 774 F. 2d 575, 581 (3rd Cir. 1985).

Similarly, there is nothing in either the Rowley holding or the principles ennunciated therein, which would be at odds with a higher state substantive standard. The appropriate resolution of federal and state interests and roles is one in which Congress requires that there be a federal minimum, or floor of opportunity, below which a state may not drop, but upon which

states are allowed, and even encouraged to build or expand. See e.g., Everett v. Schramm, 772 F. 2d 1114, 1119 (3rd Cir. 1985) (AFDC statute gives states freedom to raise level of benefits to meet local conditions).

Historically the role of the states in elementary and secondary education has been a primary one, and often the state's involvement in the education of the handicapped was one which predated that of the federal government. In view of that history, and important principles of federalism, Congress' requirement of a federal minimum cannot be understood as reducing any pre-existing state standards to the lower federal level. Thus, in states such as Massachusetts where the substantive standard is higher than that of the federal "floor of opportunity,"

there must be a means by which the differing standards are resolved. As will be discussed in the next section, Congress effectively avoided this potential conflict by explicitly incorporating the state educational standards into the Act through the definition of "free appropriate public education."

b. The language and history of the EAHCA support the First Circuit's analysis of the role of state special education standards.

To address the question of whether the federal Act incorporates state law, the critical first step must be an examination of the statute itself. North Haven Board of Education v. Bell, 456 U.S. 512, 520 (1982). As the decision below pointed out, the essential right guaranteed by the Act, a "free appropriate public education" is expli-

citly defined at the beginning of the Act:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1415(a)(5) of this title. 20 U.S.C. § 1401(18)(emphasis added).

David D., 775 F.2d at 417.

In Rowley, this Court explained the requirements placed upon participating states:

> Almost as a checklist of adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the

> State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Rowley, 458 U.S. at 188-189.

The most obvious "state standard" that Congress intended to insert this formula is the state's own standard of educational opportunity. See Geis, 774 F. 2d at 581; David D., 775 F. 2d at 417. Adequacy of educational programming, including adherence to state standards, may be challenged by parents through an administrative hearing which may be brought "with respect to any matter related to the identification, evaluation, or education placement of the child, or the provision of a free

appropriate public education." 20 U.S.C. § 1415(b)(2), David D., 775 F. 2d at 418. Any party agrieved regarding any issue may bring an action in either state or federal court, which court has broad discretion to grant appropriate relief. 20 U.S.C. §1415(e)(2). Burlington, 105 S. Ct. at 2003. The plain meaning of the statutory language clearly provides that state standards, incorporated into the federal definition of a "free appropriate public education" are enforceable in federal court.

Additionally, the legislative history of the Act further supports the principle that the EAHCA incorporates the state substantive law into the federal Act.[1] Senator Williams, a

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[1]As the First Circuit noted in the decision below, incorporation by reference is not unusual. See Burlington II

principal author of the Act, in explaining the conference bill to the Senate, clarified that the due process protections had been strengthened:

> Any parent or guardian may present a complaint concerning any matter regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child. In this regard, Mr. President, I would like to stress that the language referring to "free appropriate public education" has been adopted to make clear that a complaint may involve matters such as questions respecting a child's individualized education

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at 785 n. 9; see also Herb's Welding Inc. v. Gray, ___ U.S. ___, 105 S. Ct. 1421, 1425, (1985) (citing Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352, (1969); United States v. Yazell, 382 U.S. 341, 356-57, (1966); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457, (1957); DeSylvia v. Ballentine, 351 U.S. 570, 580 (1956) ("The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law"). David D., 775 F.2d at 419, n. 6.

> program, questions of whether special education and related services are being provided without charge to the parents or guardians, questions relating to whether the services provided a child meet the standards of the State educational agency, or any other question within the scope of the definition of "free appropriate public education." 121 Cong. Rec. 37415 (Nov. 19, 1975) (emphasis added.)

Thus, as noted by the First Circuit, its holding that the Act incorporates substantive state special education law into the federal right to a free and appropriate public education is squarely based upon both the Act itself as well as upon authoritative legislative history.

c. The structure and comprehensiveness of the statutory scheme also support the First Circuit's decision.

Further support for the correctness of incorporating state substantive

standards into the Act is demonstrated by the fact that to interpret the Act otherwise would create substantial inconsistency and confusion and would subject handicapped children and educational officials to inconsistent standards for the receipt and provision of special education entitlements within a state.

This Court has described the Act's enforcement procedures as a "comprehensive scheme" and a "carefully tailored administrative and judicial mechanism," to assure provision of appropriate educational services are provided. Smith v. Robinson, ___ U.S. ___, 104 S. Ct. at 3468, 3470, n. 17. That process "begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial

review," Id. The form of judicial review provided by the Act is concurrent jurisdiction for enforcement of its provisions in both state and federal court, § 1412(e)(2); Rowley, 458 U.S. at 183.

Given the fact that some states have imposed upon themselves substantive standards which exceed the federal "floor of opportunity," without the incorporation of those standards into the Act, inconsistent standards would exist within those states. Inconsistent standards would turn the intended "comprehensive scheme" into a confusing and unpredictable maze. Without knowing what court would ultimately hear an appeal, parents and education officials would have no idea at the IEP stage which set of standards should be applied.

Similarly, a state hearing officer would not know whether to apply the federal "basic floor" or the supplemental state standards in resolving an administrative appeal. Perhaps most importantly, the jockeying for judicial forum by the parties and the attempts by education officials to remove to federal court cases filed in state court, in order to benefit from less rigorous standards, would create a confusing and unproductive type of litigation which flies in the face of the clear Congressional policy of prompt resolution of these disputes. See Burlington II, 736 F. 2d at 797. Indeed, the construction proposed by petitioner's would effectively insulate from court review erroneous decisions by hearing officers based on state law, if the case is brought in federal court.

David D., 775 F. 2d at 420; Geis, 774 F. 2d at 581. Certainly, it is unlikely that Congress by granting state and federal court concurrent jurisdiction, intended to have the standard of educational opportunity depend upon the choice of forum. Geis, supra.

It is equally unlikely that Congress intended to create "the carefully tailored administrative judicial mechanism," and then imbue it with such inconsistency and uncertainty. What does makes sense, from both a substantive and practical standpoint, is that Congress incorporated the state standards into the Act, so as to allow those requirements to be enforceable as an integrated and unified standard in both federal and state court. Geis; supra. David D., supra.

2. The decision below follows this Court's decisions regarding the Eleventh Amendment.

Petitioners assert that the First Circuit's "approach and treatment" of the Eleventh Amendment issues were "insensitive" to this Court's decisions in Pennhurst State School and Hospital v. Halderman ___ U.S. ___, 104 S. Ct. 900 (1984) ("Pennhurst II") and Atascadero State Hospital v. Scanlon, ___ U.S. ___, 105 S. Ct. 3142 (1985) ("Atascadero"). See Petition, 44-45. In other words, petitioners disagree with the First Circuit's application of the principles of Pennhurst II and Atascadero to the EAHCA and the facts of this case. They do not allege nor can they show the kind of direct conflict required to warrant review by this Court on a petition for certiorari. U.S. Sup.

Ct. Rule, 17(1) Stern and Grossman, 264-5. In fact, the First Circuit carefully and faithfully applied the analysis of those two decisions and found no Eleventh Amendment bar to the use of incorporated state law in the comprehensive statutory scheme designed by Congress to protect the Equal Protection rights of disabled children. David D., 775 F. 2d at 421-3.

a. The decision below correctly applies Atascadero.

In Atascadero this Court held that Section 504 of the Rehabilitation Act had not effectively abrogated the states' Eleventh Amendment immunity from suit in federal court where litigants seek money damanges. Id. 105 S. Ct. at 3144, 3150. The Court rejected arguments that the state had waived its immunity on the basis of state law, Id. at 3147,

that Congress had abrogated the state's immunity by enacting the Rehabilitation Act. Id. at 3149, and that by accepting federal funds under the Rehabilitation Act, the state had consented to be sued. Id. at 3150.

In its decision below the First Circuit found it necessary to address only the second issue in Atascadero, finding that by enacting the comprehensive statutory scheme in the EAHCA, Congress did effectively abrogate the Eleventh Amendment immunity of the states. David D., 775 F. 2d at 421.[2]

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[2]While the First Circuit did not find it necessary to detemine whether the participation by a state in the EAHCA constitutes a waiver of Eleventh Amendment immunity, the Ninth Circuit has examined the issue and found waiver. Students of California School for the Blind v. Honig 736 F. 2d 538, 543-4 (9th Cir. 1984) vacated as moot, 105 S. Ct. 1820 (1985); Department of Education v. Katherine D., 727 F. 2d 809, 818-19 (9th

In Atascadero, this Court found that Congress must express its intention to exercise its authority to protect Fourteenth Amendment rights "in unmistakable language in the statute itself." Atascadero, 105 S. Ct. at 3148. Unlike

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Cir. 1983). The Ninth Circuit used the standard required by this Court in Edelman v. Jordan, 415 U.S. 651 (1974) that waiver of Eleventh Amendment immunity must be by "express language" or such overwhelming implications from the text as will leave no room for any other reasonable construction. Katherine D., 727 F. 2d at 819, citing Edelman, 415 U.S. at 673. The Court of Appeals found that these criteria were satisfied with the EAHCA where Congress authorized suits against a class of defendants including states and the states voluntarily entered into an activity highly regulated by federal law. Katherine D., 727 F. 2d at 819. In fact, with the EAHCA, Congress made the states the key actor in a comprehensive and relatively complex scheme, See Smith v. Robinson, 104 S. Ct. 3457 (1984), making the state a key party (as defendant or plaintiff) in almost any litigation brought to enforce the provisions of the Act. See discussion, supra.

the Rehabilitation Act, which evokes the Fourteenth Amendment Equal Protection concerns only in the legislative history Id. 105 S. Ct. at 34 , the EAHCA expressly states in its preamble that it is enacted "to assure the equal protection of the law" for handicapped children. Pub. Law 94-142 codified at 20 U.S.C. §1400(b)(9).[3] See David D., 775 F. 2d. at 421.

In fact, as the First Circuit noted in David D., 775 F. 2d at 421-2, this Court has already held that in enacting

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[3]This express statutory language is reinforced by clear and repeated declarations in the Act's legislative history, e.g., Sen. Rep. 94-168, 22, 94th Cong., 1st Sess., reprinted in 1975 Cong. and Admin. News 1446 ("The Committee recognizes the state's primary responsibility to uphold the Constitution of the United States ... as well as Congress' own responsibility under the 14th Amendment to assure equal protection of the law.") See also S. Rep. 6, 41; Cong. News 1430, 1464.

the EAHCA Congress was exercising its Fourteenth Amendment authority to protect the Equal Protection rights of disabled children. Smith v. Robinson, 104 S. Ct. 3457 (1984). Accord, Crawford v. Pittman, 708 F. 2d 1028 (5th Cir. 1983). In Smith, the issue was whether a prevailing plaintiff in an EAHCA suit was entitled to attorney's fees under 42 U.S.C. § 1988 if he also had a substantial §1983 claim, Id. at 34. This Court found that the impetus behind the legislation was two court cases establishing that failure to provide appropriate educational services was a constitutional violation. See Smith 104 S. Ct. at 3468 referring to H.R. Rep. No. 94-332 at 3-4, citing Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972)

and Pennsylvania Assn. for Retarded Citizens v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 229 (E.D. Pa. 1972).[4] Finding that Congress enacted an especially comprehensive scheme of the Act to protect Equal Protection rights, the Court reasoned that Congress intended for this enforcement scheme to be exclusive and therefore that a special education plaintiff could not generally use other procedural avenues available to protect those rights such as 42 U.S.C. § 1983 with its associated attorney's fees remedy, 42 U.S.C. § 1988. Smith 104 S. Ct. at 3469.

Finally, the First Circuit recognized that the entire structure of the Act

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[4]This Court also noted the Equal Protection underpinings of the EAHCA in its Rowley decision. 458 U.S. at 180 n.2.

makes clear the Congressional intention that the states be principal parties to suits enforcing the Act, including suits in federal court. David D., 775 F. 2d at 422. Unlike, Section 504 of the Rehabilitation Act, which is directed broadly to "any recipient" of federal financial assistance, the EAHCA is directed toward only states and local education agencies. See 20 U.S.C. § 1412, 1413. Indeed, the states are the principal actors and the State Education Agencies are responsible for assuring compliance by all other public agencies, 20 U.S.C. § 1412(6), 34 C.F.R. § 300.600, and for holding hearings regarding complaints on "any matter" related to a child's special education. 20 U.S.C. § 1415(e)(2). See Smith, 104 S. Ct. at 3457. Appeals of the

hearings may be taken to either state or federal court. 20 U.S.C. § 1415(e)(2). Clearly, since states' education agencies are the enforcer of the guarantees, the administrative hearing agency, and sometimes the provider of special education services, Congress intended for states to be amenable to suit in federal court, one of the forums expressly provided for a complainant. See David D., 775 F. 2d at 422. Accord, Parks v. Pavkovic, 753 F. 2d 1397 (7th Cir. 1985).

Carefully considering this Court's admonitions in Atascadero, as well as its decisions in Smith and Rowley, the First Circuit analyzed the EAHCA and correctly found a Congressional intention to exercise its Fourteenth Amendment Section Five authority to protect the

Equal Protection rights of disabled children.[5]

The First Circuit also analyzed this Court's decision in Pennhurst II, finding Eleventh Amendment protection for states against federal court enforcement of pendant state law claims against the states themselves. David D., 774 F. 2d at 422; Pennhurst II, 104 S. Ct. at 905. The First Circuit noted that Pennhurst II dealt with entirely separate state law claims which plaintiff had included as pendant claims in their federal law suit. Id. The Court found

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[5]Although the First Circuit did not address the distinction, it should be made clear that this and most special education cases deal only with prospective relief for an individual child, not monetary damages or substantial relief against an entire institution, of a type that have been especially susceptible to Eleventh Amendment protection. See e.g., Edelman v. Jordan, 415 U.S. 651 (1974).

that there is a critical distinction in that the EAHCA incorporates state law by reference, See discussion, supra, and noted that this Court had implictly confirmed this approach in Smith v. Robinson, 104 S. Ct. at 3464 n.6. Moreover, the other two circuits which have expressly addressed the issue, agreed that state law incorporated into the EAHCA is not subject to the strictures of Pennhurst II. Geis, 774 F. 2d at 581; Honig, 736 F. 2d at 543. See discussion, infra.

Far for being in direct conflict with decisions of this Court, the decision below carefully and faithfully followed and applied the decisions of this Court and reached a result consistent with those decisions.

b. There is no split in the Circuits on the issue decided below.

Notably absent from the petitioners' arguments in favor of a grant of certiorari, is one that there is split among the circuits on the issue presented. That is because the three circuits that have addressed the issue of the use of state law in EAHCA cases have all agreed, with remarkably similar reasoning. David D., Geis, Honig.

At about the same time the First Circuit was doing its first analysis of the incorporation of state law into the EAHCA in Town of Burlington v. Department of Education, 736 F. 2d 773 (1st Cir. 1984) affirmed 105 S. Ct. 1996 (1985), the Ninth Circuit was doing similar analysis in Students of California School for the Blind v. Honig, 736 F. 2d

538 (9th Cir. 1984), vacated as moot 105 S. Ct. 1820 (1985). In Honig the considered the Pennhurst II decision and like the First Circuit found that Pennhurst II does not apply when state law is incorporated into the federal statutory scheme. Id. 736 F. 2d at 543. It also found that Congress "expressly" and "unambiguously" incorporated the standards[6] of the state education agency into the federal statute, enforceable by a federal court. Id. at 545.

In Geis the Court of Appeals for the Third Circuit also analyzed Pennhurst II and found it inapplicable to state law incorporated into the EAHCA, Id. 774 F. 2d at 581. The Third Circuit had the benefit of an earlier decision, Everett

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[6]In Honig, the state standards were safety standards, limiting sites suitable for educational facilities. Id. at 541.

v. Schramm, 772 F. 2d 1114 (3rd 1985) where it also found incorporation by reference of state benefit standards into the federal Aid for Families with Dependent Children statute. Id. 772 F. 2d at 1119. In Geis the Third Circuit evaluated the EAHCA statutory scheme and, like the First Circuit below, David D., 775 F. 2d at 419, found it "unlikely" that in granting both state and federal courts concurrent jurisdiction to enforce the Act, that Congress intented that "the standard of educational opportunity to be applied would depend on the forum." Geis, 774 F. 2d at 581. Comparing its case to Honig, the Third Circuit found that incorporation by reference even more clearly applies to the state's own standards for educational opportunity than it does to the sort of school safety

issues addressed in Honig, Id. The Court then affirms the District Court decision which held that although the proposed IEP met the minimum federal standards, it failed to meet with New Jersey "best achieve success" standard for the plaintiff. Id. 581-84.

Those Courts of Appeal which have considered the issue all agree with the decision below. There is no split in the Circuits which would justify further review by this Court.

c. The decision below follows Massachusetts court decisions.

As the decision below noted, the district court's use of the "maximum possible development" standard comes from a recent decision of the Massachusetts Supreme Judicial Court. David D., 775 F. 2d at 423 citing Stock v. Massachusetts Hospital School, 392 Mass. 205,

211. 467 N.E. 2d 448, 453 (1984). (The law of this Commonwealth "mandates that the department administer special education programs so as to assure maximum possible development of a child with special needs.")[7] The District Court, 615 F. Supp. at 645, App. 88-90 and the First Circuit in its earlier Burlington decision, 736 F. 2d at 789, also referred to an earlier decision of the state's intermediate appellate court, Isgur v. School Committee of Newton, 9 Mass. App. Ct. 290, 400 N.E. 2d 1292 (1980) (State law requires special education services to provide maximum

[7]As the petitioner's note, they do not attempt to have this Court construe state law, Petition, 24 n. 10. However, petitioners continue to suggest that the First Circuit misunderstood state law. As this discussion shows, the Court below simply applies Massachusetts state court decisions.

feasible benefit in the least restrictive environment.) Furthermore, the District Court reinforced its review of state court decisions by a comprehensive survey of the state special education statute itself, where variations on "maximum feasible benefit" or "maximum potential development" are used no less than five times. David D., 615 F. Supp. at 644-5. See G.L. c. 71B § 2, 3; c. 15 § 1M(19).

The courts below used decisions of the Massachusetts appellate courts, reinforced by the clear language of the state statute, to determine applicable state law. There is no conflict which would warrant a grant of certiorari by this Court.

II. A GRANT OF THE PETITION IS NOT JUSTIFIED BECAUSE THE DECISION BELOW WILL HAVE LIMITED IMPACT.

Because of the enormous number of litigants seeking review by this Court, a principal consideration in whether or not to grant discretionary review is the magnitude of the impact of the case on other litigants. See Stern and Grossman, 284-5. The decision below does not have the level of impact necessary to warrant discretionary review because (1) few states have a higher standard of educational opportunity, (2) incorporation of the higher state standard in those few states only affects the limited number of cases which end up in federal court and which would have different results under the state rather than federal standard, and (3) this case

would not have been decided differently under the basic federal standard.

A. The decision below only affects a few states.

Incorporation by reference of state educational opportunity standards arguably has no effect on the states because the only result is that the same law is used in state and federal court for resolution of special education appeals brought pursuant to 20 U.S.C. § 1415(e)(2). However, even assuming defendants' claim that use of state law in federal court does affect the states, this effect will be quite limited, in part because of the few states which have a higher standard under state law.[8] Counsel has discovered only ten states

[8]Of course, the First Circuit's decision is authoritative precedent only in the First Circuit where only Massachusetts has a higher standard.

which seem to have higher educational opportunity standards under their state statutes.[9] Of these, only New Jersey's has been used by a federal court to apply a higher standard of educational opportunity. Geis, supra.[10] These state

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[9]Counsel has been able to identify only six other states which may establish a standard for educational opportunity higher than the federal forum. Arkansas (Ark. Stat. Ann. §80-2117), Iowa (Ia. Code Ann §281.2), New Jersey (N.J. Stat. Ann. §18A:46-19.1), Rhode Island (R.I. G.L. §16-24-1), Tennessee (Tenn. Code Ann. §49-2912). As we note below, the Rhode Island statute has been interpreted to require no more than the federal minimum.

[10]Petitioners imply that the Rhode Island statute was used to impose a greater obligation in Scituate School Committee v. Robert B., 620 F. Supp. 1224 (D. R.I. 1985). See Petition, 22 n.9. In fact, that Court explicitly found that "Rhode Island does not impose a higher standard than the federal minimum." Id. at 1233 (emphasis supplied). In Cothern v. Mallory, 565 F. Supp. 701 (W.D. Mo. 1983), the Court did not have to apply the arguably higher state standard, because it found the IEP did not even meet federal

statutes vary in how different they are from the federal minimum, and all are subject to revision by state legislatures or limiting construction by state appellate courts. See David D., 775 F. 2d at 423 n.8 (State legislature or highest appellate court are free to revise applicable state law.) The decision below therefore only has an effect on the few states which have now, and in the future continue to have, state standards which require more than the federal minimum set out in the EAHCA.

B. The decision below only affects the limited number of cases which are heard in federal court and which would have different results depending on the choice of law.

Even in the states with an arguably higher standard, incorporation of that

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minimum requirements. Id. at 708.

standard into the federal Act will only affect the limited number of cases which both are in federal court and have results which rely upon the higher state standard. Since, the federal Act provides alternative forums, 20 U.S.C. § 1415(e)(2) many appeals of special education administrative decisions are brought in state court.[11] Incorporation of the state standard into the federal Act would be irrelevant in these cases since the state courts will obviously apply their own state law directly, without regard to whether it is also

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[11] It is counsel's experience that because many attorneys feel more comfortable with state court practice and even more wish to avoid the complex federal jurisdictional issues, such as those raised in this case, most attorneys for parents or school officials would prefer to file in state court, all other considerations being equal.

included in the federal law. See, e.g., Isgur, supra.

Of the few cases that still end up in federal court, a substantial proportion will be ones in which either the IEP proposed by school officials was so inadequate that it does not even meet the federal minimum requirements, or the proposed IEP is of such clear merit that it meets both state and federal standards. In the first instance the parents would win, under either federal or state incorporated standard. In the second instance, the school would win, whichever standard was applied. The decision of the First Circuit below has an impact only on those few cases in between, where the court's decision depends upon whether it uses the federal minimum standard or the somewhat higher

state standard. Apparently, Geis is an example of a case in which the result depended upon the distinction. Geis, 774 F. 2d at 581. In Cothern, the distinction did not affect the result, since the Court found the IEP met both state and federal standards. 565 F. Supp. at 708. Indeed, while not explicit in the decisions below, the result of the case at bar would not have changed under an application of federal minimum requirements. See discussion infra.

C. The decision below would not have been decided differently under the federal minimum standard.

Petitioners erroneously imply that the decision below found that the special education services provided by the local school committee met the minimum federal requirements established by the EAHCA. See Petition 7-8. In

fact, there is no such finding, and an examination of the record and the decisions below show that the proposed IEP would have been found inadequate even without use of the higher state standard.

Before even addressing the District Court's use of the state law standard, the Court of Appeals found that the "overwhelming" evidence showed that a change in David's IEP was warranted. David D., 775 F. 2d at 423. The Court reviewed with approval the District Court's findings that while David may be making progress in some areas, his serious problems in the behavioral area continued unabated and in fact had worsened over the preceding two years. Id. Only then does the Court of Appeals turn to and approve the use of the

higher state standard by the District Court. Id.

Like the First Circuit, the District makes no explicit finding of whether Dartmouth's proposed IEP meets the federal minimum standard,[12] but the analysis makes it clear that the IEP would not have passed muster even under the less demanding measure. For example, after accepting the state hearing officer's findings on some preliminary issues, the District Court rejects the administrative findings "that plaintiff was achieving effective educational progress," holding instead that the

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[12]Presumably both courts considered it unnecessary to make explicit findings regarding the application of the federal minimum requirements, since application of the state standard allowed plaintiff the relief be sought. Addressing the other issue was therefore unnecessary, and courts generally avoid questions not required to resolve a case.

proposed IEP did not provide for the type of consistency required to teach David fundamental social skills. David D., 615 F. Supp. at 646-7. Nowhere does the District Court suggest that the proposed IEP, while falling short of the higher state standard, might have been sufficient to meet the federal minimum.

Because of the overwhelming weight of the evidence recognized by both the District Court and the Court of Appeals, the results below would have been nc different even if the courts had not incorporated and applied the higher state standard. Therefore reversal of the First Circuit by this Court on the issue of incorporation by reference would not effect the ultimate result. Under these circumstances, discretionary review by this Court is not warranted.

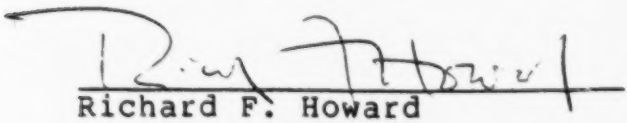
CONCLUSION

For the foregoing reasons the Petition for Certiorari should be denied.

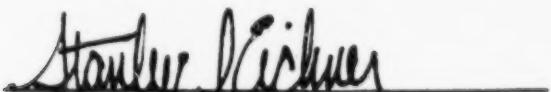
Respectfully submitted,

RESPONDENT, DAVID D.

By his attorneys



Richard F. Howard



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